

City of Detroit


CITY COUNCIL

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To: Honorable City Council

From: David D. Whitaker, Director 
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Re: **NEW AMENDED MODEL WATER CONTRACTS FOR
FLAT ROCK, NEW HAVEN AND HAZEL PARK**

Date: April 14, 2010

Since July 2008, Council has been provided with many of the new 30-year water service contracts between the City of Detroit - through Detroit Water and Sewerage Department (DWSD) - and suburban communities, requesting Council's approval. Because of the long-term significance of the issues involving the new water contracts for the City and the regional water and sewerage system, RAD preliminarily reviewed these contracts. As these contracts have evolved in the last two years, RAD has periodically provided Reports to Your Honorable Body, so that you are generally informed about the status of such contracts.

DWSD has recently provided Council with three new, amended standard service contracts, in addition to such amended contracts that were previously provided, and addressed in RAD's previous Report dated March 3, 2010. This updated Report repeats some of the information contained in RAD's previous Reports regarding the original and amended standardized 30 year water and sewerage contracts, so that Council Members have a conveniently consolidated and adequate basis of information for addressing the issues involved in these contracts.

In August 2008, after a brief overview of these lengthy and complex contracts,¹ RAD had the following observations, which are still generally applicable to the revised versions (subject to the amendments discussed below):

¹ As RAD previously noted, these appear to be well-drafted and thorough, detailed agreements, covering a very complex and specialized subject, which presumably include many basic policy decisions regarding the relationships between DWSD and its wholesale customers. Based on the current level of knowledge and expertise regarding water and sewerage supply that is available to RAD staff at this time, including the

1. The contracts are identical 21-page documents, except for the names of the parties and signatories, and the individual customers' service areas (Exhibit A to each contract) and service level needs (Exhibit B).
2. The DWSD summer 2008 newsletter article stated that their goal was to have 65 contracts completed and signed by the end of 2010. It is RAD's understanding, based on the number of contracts that have been submitted to Council, that at this time they may be more than half way toward that goal.
3. Comparing the first 5 signed contracts in 2008 with the model contract from the DWSD web site:
 - a. "City Council" was a defined term in the model contract (p 1), but not in the actual contracts. (However, the definition of "Contract" (p 2) does expressly include approval by "the Detroit City Council.") This seems to make sense, in part because other "city councils" of DWSD's customers are also approving these contracts.
 - b. "WWTP" (DWSD's Wastewater Treatment Plant) is a defined term in the model contract (p 3)², but not in the actual contracts.
 - c. Article 2, specifying the Customer's Maximum Allowable Flow Limit, was deleted from the model contract, and Exhibit B substituted.
 - d. Although the model contract allows for 15- or 30-year terms (p 7), with renewal options, the actual contracts are for 30 years plus renewal options. (p 5)
 - e. The actual contracts have an article on Early Termination Costs (p 6) that is not included in the model contract. (See amendments discussed below)
 - f. The actual contracts have an article on the Technical Advisory Committee (TAC) (p 11) that is not included in the model contract. The formation and work of this committee, according to the DWSD newsletter, was apparently a major step toward finalizing these contracts. City Council may wish to seek additional information about the ongoing work of the TAC. There were six work groups of the TAC, as of January 1, 2008:
 - i. Analytical;

specifics of DWSD's operations, as well as general technical, environmental, economic and other issues affecting municipal water and sewerage systems, RAD staff may not be in a position to thoroughly evaluate all the issues in depth, without a great deal of additional research and analysis. Attorneys in the Law Department negotiated and drafted these agreements, and would have the most personal knowledge about the issues.

² "WWTP" shall mean The Detroit Water and Sewerage Department's Wastewater Treatment Plant. Council may want to ask DWSD whether the deletion of this definition in the actual contract has any significance. This plant has been recognized as "one of the largest governmental utilities providing water and wastewater service in the United States." *Lessard v City of Allen Park*, 247 F Supp 2d 843 (ED MI 2003) The latest contracts define the "System" as "the public water works system owned and operated by the City of Detroit, acting through its Board of Water Commissioners and its Water and Sewerage Department." (p 5)

- ii. Best Practices;
- iii. Contract;
- iv. Customer Service;
- v. Emergency Preparedness; and
- vi. Rates.

4. Key substantive provisions of these contracts seem to include the following:
 - a. "Rates shall be reasonable in relation to the costs incurred," in conformity with MCL 123.141 *et seq.* (p 13) (Article 7. Rates)
 - b. If the Board enters into any more favorable agreement with any other customer, then the customers who signed these contracts can elect to adopt all the more favorable terms (p 16) (Article 14. Ensuring Equality of Contract Terms) (This apparently makes the amendments automatically applicable to communities who previously signed contracts.)

Under cover of January 27, 2010, Council was provided with 26 more of the new 30-year water service contracts, as amended, again requesting Council's approval. These new contracts incorporate agreements to the terms of Amendment No. 1 to the Water Service Contract. DWSD stated that Amendment No. 1 is the first of several that are anticipated throughout the 30-year contract term. This amendment agrees to modify the projected annual volume, pressure range(s), maximum day and peak hour values for the period between 2010 and 2012 (requiring amendments of Exhibits A and B to each contract). It also added the following new or substitute language:

- Section 3.01 substituted language providing that the customer is not liable to the Board of Water Commissioners in the event of early termination by the customer, if it is terminated for cause.
- Section 3.05 is a new section, providing that annexation or consolidation of the customer with another Michigan municipal corporation that is a current customer shall not be construed as an early termination of the contract.
- Section 5.01 substituted language providing that a pressure range for the customer will not be established for water meters located on a DWSD transmission main downstream, and subject to the flow demands, of another customer.
- Section 5.10 substituted language providing that the customer shall be informed in writing any time it is required to develop and implement a corrective action plan.
- Section 18.02 substituted language providing that the ability to charge the costs of future construction in future rates as a common-to-all cost applies to any city township, village or county (as opposed to any federal, state or county agency under the previous language).

- Section 18.03 substituted language providing that the relocation of water transmission mains, meter facilities or other Board facilities is included in the easements granted for purposes of system construction and maintenance.
- Section 23.05 substituted language deleting the agreement to litigate disputes in federal or state court in Wayne County.
- Exhibits A and B were amended.

In sum, Amendment 1 appears to relate to a number of fairly technical adjustments to the basic new 30-year standardized water services contract.

Under cover of February 24, 2010 (for Hazel Park), and March 24, 2010 (for Flat Rock and New Haven), Council has been provided with 3 more of the new 30-year water service contracts, as amended, again requesting Council's approval. As previously reported, the general terms of all these detailed, standardized contracts are essentially identical, with the exception of two contract exhibits attached to each: Exhibit A of each contract sets forth the particular customer's service area and metering information, and Exhibit B in each case sets forth that customer's particular service level needs. Additionally, and as detailed in RAD's previous Report dated March 3, 2010, these new contracts incorporate the terms of Amendment No. 1 to the Water Service Contract, the first of several that are anticipated throughout the 30-year contract term.

In light of the substantial nature of the regional water system and its new, standardized 30-year water contracts, as well as the diverse new aspects of Amendment 1, and other issues regarding the water and sewerage system, Council may wish to schedule a discussion with representatives to DWSD to receive an update on the status of these contracts, the reasons for the amendments, and other issues of concern, if any.

If Your Honorable Body has any other questions or concerns regarding this subject, RAD will be happy to provide further research and analysis upon request.

report re:

New Amended Model H₂O contracts
for Flat Rock, New Haven, & Hazel Park

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Report Classification

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